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## MENTAL STATES IN WILLS\*

A. J. WHITE HUTTON\*\*

Section 1 of the Wills Act of 1917<sup>1</sup> provides as follows:

"Every person of sound mind and of the age of twenty-one years or upwards, whether married or single, may dispose by will of his or her real estate, whether such estate is held in fee simple or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate."

### SOUND MIND

The Act prescribes that the person making the will must have "a sound mind." What is meant by this requirement? In every day language and according to standard dictionaries, the meaning is a mind that is healthy, not diseased, with faculties complete and in perfect action. But this is not the meaning attached to this phrase by the judges who, under our system of law and government, are the final arbiters of the meaning of the legislative body.<sup>2</sup> In the redundant and flourishing style of the scrivener of the past century, the testator asseverated that he was "of sound disposing mind and memory." Not that this was a necessary declaration, for, as Drew, J., explains in *Olshefski's Estate*,<sup>3</sup> citing a wealth of authority,<sup>4</sup> where the will is properly executed, "a presumption of testamentary

\*Being part of the revised edition of Hutton on Wills, to be published by Soney and Sage. All rights reserved by A. J. White Hutton and Soney and Sage.

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<sup>1</sup>20 PS 181.

<sup>2</sup>*Brennan's Est.*, 312 Pa. 335 (1933) 168 A. 25; *Pusey's Est.*, 321 Pa. 248 (1936) 184 A. 844; *Cookson's Est.*, 325 Pa. 81 (1937) 188 A. 904; *Weber's Est.*, 334 Pa. 216 (1919) 5 A. 2d. 550. <sup>3</sup>337 Pa. 420 (1940) 11 A. 2d. 487.

<sup>4</sup>*Grubbs vs. McDonald*, 91 Pa. 236 (1879); *Wertheimer's Est.*, 286 Pa. 155 (1926) 133 A. 144; *Lawrence's Est.*, 286 Pa. 58 (1926) 132 A. 786; *Null's Est.*, 302 Pa. 64 (1930) 153 A. 137.

capacity and lack of undue influence arises, and the contestants must adduce compelling evidence to upset the will, since the law favors its validity." Nevertheless, the ancient phrase is a happy one, for it affords us a clue to the meaning of the statute, according to the cases. The mind must be disposing and there must be memory, both of which indicate soundness. If this be true, nothing else matters. According to Kephart, J., in *Lawrence's Estate*,<sup>5</sup> "Old age, sickness, distress, debility of body, peculiar beliefs and opinions, incapacity to do business, partial failure of memory, neither prove nor raise a presumption of incapacity."

In *Leech vs. Leech*,<sup>6</sup> Judge King explains the matter as accurately and tersely as may be found in any judicial utterance:

"A disposing mind and memory, in the view of the law, is one in which the testator is shown to have had at the making and execution of a last will a full intelligent consciousness of the nature and effect of the act he was engaged in; a full knowledge of the property he possessed; an understanding of the disposition he wished to make of it by will, and of the persons and objects he desired to participate in his bounty."

Upon these succinct specifications hang all the Pennsylvania law as to testamentary capacity, amply supported by a wealth of excellent illustrative cases.<sup>7</sup>

#### DISPOSING MIND AND MEMORY

Recurring to the test of Judge King as to testamentary capacity, it is required that the person making a will shall have the consciousness and realization of the act that he is performing, viz, in a word he must have mentality sufficient to know that he is making a will and that the effect of the instrument as executed will be to give title at his death to the property designated and to the persons designated; this is the ultimate meaning of sound disposing mind and memory. In *Daniel vs. Daniel*<sup>8</sup> the scrivener called upon to testify stated that he went to the bedside of the testator who was in a dying condition and he asked him what he wanted done, to which the answer of the testator was in Pennsylvania German: "Der Charles wess"—Charles knows. Charles was a brother substantially interested in the terms of the will. Later Charles said to the testator: "Now here is the man whom I have brought to write your will." Charles then told the testator to state to the scrivener what he wanted and followed by asking the testator how much certain persons were to receive, mentioning \$2000, \$3000, \$4000, \$5000, and \$6000. The testator in these interrogations would always select the last sum mentioned. Another witness, a lawyer who had transacted

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<sup>5</sup>286 Pa. 58 (1926) 132 A. 786.

<sup>6</sup>1 Phila. 244, affirmed, 21 Pa. 67 (1853).

<sup>7</sup>*Duncan's Will*, 147 Pa. Sup. Ct. 133 (1941) 23 A. 2d. 357, and cases following in these notes.

<sup>8</sup>39 Pa. 191 (1861).

business for the testator, testified that in his opinion the testator was of a low grade of intelligence, about the same as an imbecile. Woodward, J., reviewing this and other testimony, agreed that the judgment on the verdict of the jury against the will should be affirmed. However, the learned justice pointed out that when a man is spoken of as understanding the will he is making, it is never meant that he comprehends the possible legal effect which lawyers and judges may impute to the words he employs. The nicest and most difficult questions in law frequently arise upon the construction of wills. Testamentary capacity does not necessarily include an ability to grapple such questions. This is apparent in *Diehl's Estate*<sup>9</sup> where, in a homemade will the testatrix used the expression, "I have given (not bequeathed) \$600 or more, if necessary, to put a good iron fence around the graveyard near the Lutheran Church in this place." In all probability, testatrix was not informed as to the technical meaning of the words that she used, but it was quite clear that she meant to make a gift to take effect at death and she knew what the act of making a will signified or, in the language of the test, she had a consciousness and realization of the import of her act. However, it is important to bear in mind that the law of Pennsylvania does not require a high order of intelligence in the making of a will and it has been stated repeatedly by our courts that it requires less capacity to make a will than to do ordinary business, although in Maryland by statute testamentary capacity is placed on a par with contractual capacity.<sup>10</sup>

In *Wilson vs. Mitchell*<sup>11</sup> the testator was 100 years of age at the time of the execution of his will. Much testimony was brought out concerning his physical debility, loss of memory, the habit of dosing off into sleep frequently on occasions during the daytime, and filthiness of habits and care of his person. However, the direct evidence was on the matter of the execution of his will that he maintained a very lively interest in the same and directed what should be done and discussed various details, thus indicating that he realized the import and significance of his act. Said Trunkey, J.:

"If from any cause he is so enfeebled in mind as to be incapable of knowing the property he possesses; of appreciating the effect of any disposition made by him of it; and of understanding to whom he intends to bequeath it, he is without the requisite testamentary capacity: *Leech vs. Leech*, 21 Id. 67. 'He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or by disease. He may not be able at all times to recollect the names, the persons or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding may be sufficiently

<sup>9</sup>11 Pa. Superior Ct. 293 (1899).

<sup>10</sup>Ann. Cases, 1915 A. 362-3; *Davis v. Calvert*, 5 Gill & J. 209 (1833) 25 Am. Dec. 282.

<sup>11</sup>101 Pa. 495 (1882).

sound for many of the ordinary transactions of life. He may not have sufficient strength of memory, and vigor of intellect, to make, and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing; more especially, in such a reduced state of mind and memory, he may be able to recollect and to understand the disposition of his property which he had made by a former will, when the same is distinctly read over to him. The question is not so much what was the degree of memory possessed by the testator as this—Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it and the objects of his bounty? To sum up the whole in the most simple and intelligent form—Were his mind and memory sufficiently sound to enable him to know, and to understand, the business in which he was engaged at the time when he executed the will? *Stevens vs. Vancleve*, 4 Wash. C. C. 262; *Lowe vs. Williamson*, 1 Green Ch. 82. Neither age, nor sickness, nor extreme distress or debility of body will affect the capacity to make a will, if sufficient intelligence remains. The failure of memory is not sufficient to create the incapacity, unless it be total, or extend to his immediate family or property."

In Minnig's Estate<sup>12</sup> testatrix was 80 years of age at the time of the execution of her will dated March 3, 1927. She died July 29, 1927, leaving her entire estate to her brother, John Minnig. On January 19, 1927 testatrix suffered a hemorrhage of the brain and was unconscious for five days, during which time and until March 4, 1927 she was attended by her family physician who did not call after that because she had recovered to such an extent that the doctor did not think it necessary. Before her lawyer drew the will he consulted the physician to learn whether she was mentally competent to dispose of her property, and on being told she was, he called at her home on March 3, 1927 and conversed with her concerning the disposition she wished to make of her estate. The will was then written out in longhand in her presence, read to her, and she signed it by her mark and it was witnessed by two persons, a man and wife who had been employed by the testatrix to attend her and look after her affairs during her illness. The will was probated and thereafter an appeal was taken by certain nieces and nephews of the decedent who in a petition to the court prayed for the awarding of an issue on the questions of mental incompetency and undue influence. An answer was filed denying the averments of the petition and after hearing testimony the court dismissed the appeal and refused an issue on the ground that the evidence of undue influence and mental incompetency was insufficient to justify a submission of the questions to a jury or to sustain a verdict against the will. In reviewing the record and affirming the decree of the court below, Frazer, J., observed:

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<sup>12</sup>300 Pa. 435 (1930) 150 A. 626.

"So far as what took place at the time of the signing of the will is concerned, there is no contradiction, since contestants called no witness who was present at that particular time. The evidence relied on by the contestants was to the effect that, after the spell of sickness which began on January 19, 1927, testatrix was in a weakened physical condition and scarcely able to help herself and would ask 'all kinds of peculiar question'; had a poor memory in regard to her business affairs, and would even at times fail to recollect her friends and relatives; would repeatedly ask the same questions, stating to a witness that she believed she was losing her mind, although the witness referred to a time a year or more before the death of testatrix; the same witness also testified that testatrix said she had made her will and that her brother John Minnig would not get a cent; as a matter of fact, the will which had been in existence before the one now in question gave all her property to nieces and nephews to the exclusion of her brother, and the statement was accordingly correct at the time it was made. Taking this evidence as a whole there is a total lack of testimony to overcome that of the attorney and witnesses to the will and the attending physician to the effect that at the time the will was executed testatrix was mentally competent to dispose of her property."

In *Cookson's Estate*<sup>13</sup> an interesting situation was presented which well illustrates the attitude of our higher courts in maintaining the right of testamentary disposition in a case of old age and physical as well as mental debility. The testatrix was 82 years of age, and at the time of the execution by mark of a codicil to her will was extremely ill in a hospital and died four days thereafter. This was drafted by her business agent and in accordance with her wishes as he afterwards testified. He was also present at the time of the execution. The attending physician, together with another person, were the subscribing witnesses. Following the death the will was probated and later an issue was awarded by the orphans' court to determine decedent's testamentary capacity at the time the codicil was executed and whether it was procured by undue influence. The jury found testamentary incapacity and undue influence. Upon appeal Kephart, C. J., reviewing a large number of the leading cases, the judgment of the court below was reversed and a new trial ordered. Although the subscribing witnesses by their affidavits before the register of wills stated that the testatrix had testamentary capacity to the best of their knowledge, nevertheless at the trial the doctor testified that the decedent at the time of the execution of the codicil was in a dazed condition and did not appear to comprehend what she was doing. The other witness testified that the decedent was in a semi-comatose condition at the time and had to be aroused. Both testified that the decedent fell back exhausted before completing the execution. On the other hand the business agent, together with the daughter of the decedent who was a beneficiary under the will, testified very strongly in favor of the testamentary capacity of decedent and that at the time of execution she was rational, wide awake and fully understood what she was

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<sup>13</sup>325 Pa. 81 (1937) 188 A. 904.

doing. The Chief Justice in referring to the burden which rested upon contestant, explained as follows:

"The burden rested upon the contestant, Brown, to prove both undue influence and lack of testamentary capacity. The invalidity of a will for these reasons must be established by the manifest weight of evidence, and the testimony as a whole must support the verdict. In such an issue the judge acts as a chancellor and should not permit the finding of a jury to stand which is contrary to the weight of the evidence. While testatrix was extremely sick when the codicil was written, no confidential relationship was shown to exist between her and appellant. The fact that proponent is a daughter does not of itself constitute such confidential relation as would shift the burden of proof. These principles are too well settled to require further elaboration."

Stating furthermore that the record in the present case was void of any evidence sufficient to justify a finding of undue influence, the reversal and the awarding of a new trial were based on the following reasoning:

"The trial court charged with respect to the attending physician's testimony: 'You should consider the testimony of Dr. Daniel J. Donnelly, the physician in attendance on Mrs. Cookson, bearing in mind that a physician who has been in attendance upon a patient for a considerable length of time is ordinarily best qualified to pass upon the mental capacity of a testator.' This instruction unduly emphasized the importance of Dr. Donnelly's testimony as contrasted to that of Mr. Foster, the scrivener and business agent of decedent for many years. This court has stated on many occasions that expert medical opinions are of little weight when based upon insufficient facts or an erroneous conception of testamentary capacity, and should be entirely disregarded when contrary to established facts revealing mental capacity. Furthermore, such opinions are of very doubtful value where they are purely theoretical in character, and the physician is ignorant of the actual facts upholding or negating the existence of testamentary capacity. In the instant case Dr. Donnelly's testimony is far less convincing than that of Mr. Foster, assuming both told the truth. Mr. Foster had been decedent's agent for a long period of time and was fully conversant with her ability to supervise her business affairs. If she was as mentally alert as he testified and actually conversed with him in the manner related by him, it is evident that she possessed testamentary capacity. She not only explained to him her reason for changing the will, but arranged to have her hospital bills paid, and inquired as to an interest payment on her property. On the other hand, Dr. Donnelly saw her for the first time on December 5, 1933. His opinion was based solely on his general observation plus the fact that his physical examination showed her she was extremely toxic. He admitted he made no examination to determine her mental capacity. The essence of his testimony is that the degree of toxicity from which she was suffering would render her mentally incompetent to understand the meaning of her act and to whom her property would go. He did not relate any actual facts definitely establishing this conclusion

or evidencing in reality such mental weakness on her part. He did not see her for more than three hours before the codicil was executed and admitted he did not know definitely her mental condition at that time, but stated that in her condition her mind could not have been clear. It is obvious that his opinion, based almost solely on her physical condition, could have little weight in face of the facts testified to by Mr. Foster, if the jury found him to be worthy of belief. The court's charge unequivocally placed Dr. Donnelly's testimony on a much higher plane than that of Mr. Foster, if not as conclusive of the question, and warranted the jury in finding testamentary incapacity on the basis of his medical opinion, even though they might believe the scrivener. This was prejudicial error and in itself requires a new trial."<sup>14</sup>

*Aggas vs. Munnell*<sup>15</sup> is likewise an apt illustration where there was concerned the will of a Civil War veteran executed several months before the death of the testator at the age of 87. He sent for a lawyer and there was considerable discussion concerning a will, and eventually the lawyer drew it up and sent the same to the testator for execution. The testator discovered, however, that the lawyer had omitted one of his grandchildren and the will was consequently returned for revision. This was accomplished by the lawyer and the will as corrected was returned to the testator who then had witnesses called, and after the will was read he asked his daughter for a pen and also the date which he inserted, signed the will and had it properly witnessed. By its terms the daughter with whom the testator made his home was given 76 percent of the estate, and the rest was distributed among the testator's grandchildren. A caveat was filed against the probate of the will, the matter was certified to the orphans' court and by it to the court of common pleas for jury trial. The questions of undue influence and testamentary capacity were embraced in the issue and both questions were submitted to the jury which found a general verdict for the defendants or contestants, and from the judgment entered thereon the plaintiff daughter appealed to the Supreme Court. In reversing the judgment and entering a judgment for the plaintiff, Walling, J., stated that there was nothing in the record to sustain the contention of undue influence and as to the mental capacity of the testator, the following observations, *inter alia*, were made:

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<sup>14</sup>The following series of cases show the development of the judicial functions in will cases, the granting of issues and the role played as chancellor in jury trials *not as of common law*. Fleming's Est., 265 Pa. 399 (1919) 109 A. 265; Fleming's Est., 280 Pa. 252 (1924) 124 A. 419; Tetlow's Est., 269 Pa. 486 (1921) 112 A. 758, wherein Moschzisker, C. J., prescribes rules, cf. with Cross's Est., 278 Pa. 170 (1923) 122 Pa. 267, where the same writer lays down rules for issues; Taylor's Est., 316 Pa. 557 (1934) 175 A. 540, per Drew, J.; Kline's Est., 322 Pa. 374 (1936) 186 A. 364, per Kephart, C. J.; DeLaurentii's Est., 323 Pa. 70 (1936) 186 A. 359, per Stern, J., explaining the judicial function; Geist's Est., 325 Pa. 401 (1937) 191 A. 29; Patti's Est., 133 Pa. Super. Ct. 81 (1938) 1 A. 2d. 791; Plott's Est., 335 Pa. 81 (1939) 5 A. 2d. 901; Noble's Est., 338 Pa. 490 (1940) 12 A. 2d. 422; Rosenthal's Est., 339 Pa. 488 (1940) 15 A. 2d. 370, per Linn, J., reviewing the cases; Porter's Est., 341 Pa. 476 (1941) 19 A. 2d. 731; Mohler's Est., 343 Pa. 299 (1941) 22 A. 2d. 680; these last two cases per Maxey, J.; that the issues should not embody mixed questions of law and fact, see Phillip's Estate, 299 Pa. 415 (1930) 149 A. 719; Tranor's Est., 324 Pa. 263 (1936) 188 A. 292; Orlady's Est., 336 Pa. 369, 9 A. 2d. 539.

<sup>15</sup>302 Pa. 78 (1930) 152 A. 840.



"There was in the instant case no such proof of general insanity as to cast upon proponent the burden of showing a lucid interval when the will was executed. See *Harden v. Hays*, 9 Pa. 151; *Tiilow v. Tiilow*, 54 Pa. 216, 93 Am. Dec. 691; *Hoopes' Est.*, 174 Pa. 373, 34 A. 603. That he was sleepy and drowsy on some days and much brighter on others, indicated nothing abnormal. This is not uncommon in very old people. As stated by Mr. Justice Trunkey, speaking for the court, in *Wilson v. Mitchell*, 101 Pa. 495, 503: 'Dougal (the testator) had lived over one hundred years before he made the will, and his physical and mental weakness and defective memory were in striking contrast with their strength in the meridian of his life. He was blind; not deaf, but hearing impaired; his mind acted slowly; he was forgetful of recent events, especially of names, and repeated questions in conversation; and sometimes, when aroused from sleep or slumber, would seem bewildered. It is not singular that some of those who had known him when he was remarkable for vigor and intelligence, are of opinion that his reason was so far gone that he was incapable of making a will, although they never heard him utter an irrational expression.' The will, in the instant case, may not be just, but a person of disposing mind may make an unjust will. *Morgan's Estate*, 219 Pa. 355, 68 A. 953; *Cauffman v. Long*, 82 Pa. 72; *Guarantee T. & S. Dep. Co. v. Heidenreich*, supra."

In *Lawrence's Estate*<sup>16</sup> and *Wertheimer's Estate*<sup>17</sup> are found two very interesting cases on testamentary capacity and decided by the Supreme Court not quite a month apart and both excellent opinions by Kephart, J. In the former the facts involved the will of an aged man which had been refused probate by the Register, a caveat having been filed by his nieces and nephews. The orphans' court on appeal refused to direct probate or to award an issue, and on appeal to the higher court the decree was reversed and ordered that the will be admitted to probate. In the latter case the will of the testatrix was admitted to probate and on appeal an issue was refused, which action by the orphans' court was sustained by the higher court. In this case the charge of incapacity rested on chronic alcoholic insanity from 1908 to the death of the testatrix in 1923. In both cases there was medical testimony favoring testamentary incapacity, and in both cases the strongest evidence as to capacity consisted of detailed statements of business as transacted at about the time of the execution of the respective wills. In *Wertheimer's Estate* is found this statement by the learned justice which appears to be characteristic of so many of the will cases. In referring to the evidence concerning the eccentricities in drinking alcoholic liquors as indulged in by the testatrix, it was said:

"While all this is true, we cannot overlook our duty to safeguard the integrity of wills, a policy for which this court is noted. We must judge of the mental capacity as it is revealed by the evidence and ascertain whether it was so reduced through indulgences, general or special, at the time the will was executed, as to cause the act to be ineffective."

<sup>16</sup>286 Pa. 58 (1926) 132 A. 786.

<sup>17</sup>286 Pa. 155 (1926) 133 A. 144.

In *Olshefski's Estate*<sup>18</sup> another case where the alleged testamentary incapacity of the testatrix was due to alcoholism, the will was admitted to probate and upon appeal an award was made of an issue and the jury found that the deceased lacked testamentary capacity and was unduly influenced. Whereupon the proponent appealed to the Supreme Court and the judgment was reversed with directions to the court below to certify this result to the orphans' court. *Lawrence's Estate*<sup>19</sup> and *Wertheimer's Estate*<sup>20</sup> are cited with approval and again the medical testimony is discredited as will appear in the following excerpt from the opinion of Drew, J., wherein after citing the above cases it is remarked:

"To rebut the presumption of sound and disposing memory, these contestants and one doctor, a general practitioner, testified that deceased had a weakened mind and was addicted to excessive use of alcohol. The doctor testified that he had first treated testatrix three months prior to the execution of the will for a hemorrhage following an automobile accident, in which she sustained a blow on the head. He stated that her brain was atrophied, a condition which would become progressively worse. He concluded that she must have been incapable of testamentary disposition on the day of the execution of the will. This witness admittedly, however, had made no examination to determine her mental capacity and was extremely vague as to when he had last treated her, which at best was a considerable time prior to the execution of the will. He based his conclusions on what he thought her physical condition to be. He did not relate any actual facts to substantiate his conclusions as to her mental condition. Accordingly, his opinion was not grounded upon any definite or real knowledge of Mrs. Olshefski's testamentary capacity at the time she executed her will. Such vague and inconsequential testimony is of very little value as evidence."

In support, on the other hand, of the action of the court in reversing, the learned justice thus observed:

"As against the testimony of contestants, the proponent introduced evidence by the two subscribing witnesses who were in no way related to testatrix and who had no interest under the will. They testified that at the time of its execution testatrix was fully competent to dispose of her worldly possessions. One of these witnesses was the scrivener, a justice of the peace, and he testified that testatrix made a detailed recitation of everything she owned and the disposition she desired to be made of it, and that in doing so, she named each of her children individually and determined just what each should receive. The evidence as to the clarity of her mind was corroborated by the testimony of the other subscribing witness. The overwhelming weight of the testimony favors the competency of testatrix."

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<sup>18</sup>337 Pa. 420 (1940) 11 A. 2d. 487.

<sup>19</sup>See note 16, *supra*.

<sup>20</sup>See note 17, *supra*.

## KNOWLEDGE OF PROPERTY

Not only must the will maker have "a full and intelligent consciousness of the nature and effect of the act" at the time of execution but in addition it is stated he must have "a full knowledge of the property he possessed." However, Woodward, J., in *Daniel v. Daniel*<sup>21</sup> in laying down the test does not use the adjective "full" in describing knowledge, although he does use this word in describing consciousness of the testator. He must have had a knowledge of the property he possessed—an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty. But it is not necessary he should collect all them in one review. If he understands in detail all he is about, and chooses with understanding and reason between one disposition and another, it is sufficient. This is substantially followed in *Thompson v. Kyner*<sup>22</sup> and *Wilson v. Mitchell*.<sup>23</sup> Likewise in *Tetlow's Estate*,<sup>24</sup> Moschzisker, C. J., citing *Thompson v. Kyner*<sup>25</sup> and *Kustus v. Hager*<sup>26</sup> and referring to the testator on this very matter points out that "if he appreciates, in a general way, who his relations are and what property he possesses, and indicates an intelligent understanding of the disposition he desires to make of it, he has testamentary capacity." These remarks are referred to with approval in *Olshefski's Estate*,<sup>27</sup> citing *Tetlow's Estate*,<sup>28</sup> *supra*, and *Phillips' Estate*.<sup>29</sup> On the other hand, the omission by a testator from his will of important parts of his property might show a lack of memory indicating testamentary incapacity as pointed out by Trunkey, J., in *Wilson v. Mitchell*.<sup>30</sup>

## OBJECTS OF BOUNTY

The willmaker must have "an understanding of the disposition he wished to make . . . and of the persons and objects he desired to participate in his bounty." At another place the present writer in discussing testamentary power, has observed that a property owner might dispose of his estate as he saw fit with the exception of the restrictions mentioned. Furthermore that some writers inclined to the inclusion of the cases on soundness of mind in the same class with restrictions on testamentary power. In reality the plenary power is so restricted in this type of cases where courts and juries incline against a will of a testator who has failed to recognize his moral obligations to those denominated the natural objects of his bounty. If, for example, a father in his will should ignore a dutiful child of whom he had been very fond, a plausible explanation

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<sup>21</sup>39 Pa. 191 (1861).

<sup>22</sup>65 Pa. 468 (1871).

<sup>23</sup>101 Pa. 495 (1882).

<sup>24</sup>269 Pa. 486 (1921) 112 A. 758.

<sup>25</sup>See note 22, *supra*.

<sup>26</sup>269 Pa. 103 (1920) 112 A. 45.

<sup>27</sup>See note 18, *supra*.

<sup>28</sup>See note 24, *supra*.

<sup>29</sup>299 Pa. 415 (1930) 149 A. 719.

<sup>30</sup>See note 23, *supra*.

would be lack of memory, which as intimated by Trunkey, J., in *Wilson v. Mitchell*,<sup>31</sup> although not total yet extending to his immediate family, might indicate testamentary incapacity. In *Stevenson v. Stevenson*,<sup>32</sup> Woodward, J., alludes to the old notion of a child being cut off with a shilling thus anticipating a future effort to confess the will on ground of lack of memory and testamentary incapacity. In Crozer's Estate<sup>33</sup> Kephart, J., observed that a man's widow and children are the primary objects of his bounty. On the contrary, Woodward, J., in *Stevenson v. Stevenson*<sup>34</sup> caustically observed:

"A man without parents, wife, or children, can scarcely be said to have natural objects of his bounty; and when he has been permitted to go through life attending to his own affairs, and taking good care of his estate, it is too late, after he has made his will and died, for collaterals to discover that for six or eight years his mind had been under a cloud, and that it passed into total eclipse just at the moment of their disappointment."

However, in Patts' Estate<sup>35</sup> Parker, J., of our Superior Court, in reversing the decree of the lower court refusing an issue on testamentary capacity and undue influence, referred to a sister and brothers of the decedent, living in Italy who had been recipients of his generosity as possible objects of bounty. The inference, was that the decedent would have considered them in any will which he subscribed and again that his interest in these relations continuing explained, in part at least, his declination to sign a will, as was testified, which left them nothing. It is obvious that the point about natural objects of one's bounty is relative and may or may not be pressed, according to the particular facts. This observation, furthermore, should be remembered generally in will cases, for as Maxey, J., quoted in a case on construction, "no will is brother to another."<sup>36</sup> On the question of mental competency, in Griffin's Estate<sup>37</sup> it was said that the will, having excluded relatives should be strictly scrutinized and clear proof required of "sound mind and disposing memory" with the free exercise of voluntary choice.

### INSANITY

Our cases, following the usual classification, distinguish between general insanity which is mental incompetency complete—a permanent deficiency of mental powers—and that which is partial—a specific and narrower form of insanity—wherein there is deranged, erratic, distorted or delirious action evidenced by

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<sup>31</sup>See note 23, *supra*.

<sup>32</sup>33 Pa. 469 (1859).

<sup>33</sup>336 Pa. 266 (1939) 9 A. 2d. 535.

<sup>34</sup>See note 32, *supra*.

<sup>35</sup>133 Pa. Super. Ct. 81 (1938) 1 A. 2d. 791.

<sup>36</sup>Joyce's Est., 273 Pa. 404 (1922) 117 A. 90; Knoll v. Hart, 308 Pa. 223 (1932) 162 A. 228.

<sup>37</sup>109 Pa. Super. Ct. 594 (1933) 157 A. 613.

hallucination or delusion.<sup>38</sup> In the words of Blackstone<sup>39</sup> an idiot is "one that hath had no understanding from his nativity, and, therefore, is by law presumed never likely to attain any"—an illustration of what is termed general insanity, that is a permanent deficiency of mental powers. An imbecile, so called, and as found in *Daniel v. Daniel*<sup>40</sup> is a type of this general insanity. Blackstone<sup>41</sup> also defines a lunatic or one non compos mentis as "one who hath had understanding but, by disease, grief, or other accident, hath lost the use of his reason. A lunatic is indeed properly one that hath lucid intervals, some times enjoying his senses and sometimes not, and that frequently depending upon the change of the moon."<sup>42</sup>

In modern psychiatry there are many terms to characterize the various types of mental illness. As Lumpkin, J., observed in *Slaughter v. Heath*:<sup>43</sup>

"The mind grades up from zero to the intellectual boiling point so gradually that dogmatic tests are of little value."

From a testamentary standpoint the test has already been discussed and it is obvious that one who is generally insane, that is, without lucid intervals, cannot possess testamentary capacity. Yet the will of such a person if presented for probate with proofs of subscribing witnesses and with no caveat filed to warn the register would probably, as a matter of routine, be admitted to probate. In the cases, this has happened and upon appeal or issue granted, the insanity being shown, the burden of proof in both senses<sup>44</sup> is imposed upon the proponent. However, where there has been no adjudication or inquisition and contestants set up insanity, the affirmative is upon them. In *Grubbs v. McDonald*<sup>45</sup> Gordon, J., declared:

"Testamentary capacity is the normal condition of one of full age, and the affirmative is with him who undertakes to call it in question, and this affirmative he must establish, not in a doubtful, but in a positive, manner."<sup>46</sup>

In *Thompson v. Kyner*,<sup>47</sup> a case of senile dementia, mental weakness arising from old age, the decay of the mental faculties following the loss of bodily vigor and vitality—Thompson, J., said:

<sup>38</sup>Taylor v. Trich, 165 Pa. 586 (1894); Reppy's Cases Law of Succession (1930) 227, note; Rood on Wills, 2d. Ed. (1926) 84.

<sup>39</sup>2 Bl. \* 303.

<sup>40</sup>See note 21, supra.

<sup>41</sup>2 Bl. \* 304.

<sup>42</sup>2 Bl. 271, Lewis' Ed. (1898) where editor characterizes statement of Blackstone as to the influence of the moon or moonlight upon the human mind "as one of curious superstitions of the time."

<sup>43</sup>127 Ga. 747 (1907) 27 L.R.A. (n.s.) 1, 57 S.E. 69.

<sup>44</sup>1. As establishing the issue;

<sup>45</sup>2. going forward with evidence to dislodge a prima facie case.

<sup>46</sup>91 Pa. 236 (1879).

<sup>47</sup>Olshefski's Est., 347 Pa. 420 (1940) 11 A. 2d. 487, per Drew, J., citing Grubbs v. McDonald and other cases, deducing from them the principle, "the contestants must adduce compelling evidence to upset the will, since the law favors its validity."

<sup>48</sup>65 Pa. 368 (1870).

"Testamentary capacity is always presumed to exist until the contrary is established. An abnormal condition of mind is never presumed when a testator makes his will, unless a previous aberration be shown, of such a nature as may admit of a presumption of recurring unsoundness at any time."

#### ADJUDICATION

In *Harden v. Hays*<sup>48</sup> an action in ejectment was brought by a devisee under an alleged will dated September 24, 1844, which had never been proved before the Register. At the trial plaintiff offered in evidence the will after proving the handwriting of a deceased subscribing witness and by the oath of the surviving subscribing witness to the signature of testator. The defendants then proved a commission de lunatico inquirendo issued in December, 1844 with an inquest returned finding John Hays, the testator, a lunatic for forty years past, with lucid intervals. It was held that where there is uncontradicted evidence of general insanity at a particular period, the onus of showing a lucid interval at the time of the subsequent execution of a will lies on the party claiming under it. It is not sufficient that there is evidence of sanity before and after the day on which the will was made and the jury cannot be permitted from such evidence to infer that a lucid interval intervened, during which the will was executed. In *Titlow v. Titlow*<sup>49</sup> before the execution of the will, testator was found by inquisition to be a lunatic with lucid intervals. In an issue to determine the validity of the will, it was laid down that a finding of lunacy with lucid intervals casts the burden of showing sanity on those sustaining the will, but such finding is prima facie evidence only. In explaining these matters, Strong, J., said:

"The two remaining assignments of error may be considered together. The plaintiffs in error requested the court to charge the jury that David Titlow is bound conclusively by the finding of the inquisition, he having promoted it, submitted to it, and accepted the office of committee founded thereon, and also, that a lunatic has no power to pass his estate inland immediately by conveyance or mediately by will; and that after the lunacy has been established by inquisition a lucid interval can avail nothing, unless the finding as to lunacy in general has been avoided by due course of law. These propositions the court refused to affirm, and we think correctly. The general principle is, that an inquisition of lunacy found is prima facie evidence in cases involving the sanity of the lunatic, and no more; such is the doctrine of our cases."

However, in *Harden v. Hays*,<sup>50</sup> supra, Rogers, J., stated that under such circumstances, not only was the burden on the proponents to show that the will was executed during a lucid interval but the evidence should be of the very time of execution and of the most unexceptional kind and character.

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<sup>48</sup>9 Pa. 151 (1848).

<sup>49</sup>54 Pa. 216 (1867).

<sup>50</sup>See note 48, supra.

In *Hoope's Estate*<sup>51</sup> caveats were filed, a will was presented for probate and a request made that the register appoint "an orphans' court for the decision thereof agreeably to the 25th section of the Act of Assembly approved March 15, 1832, relating to registers, and registers' courts."<sup>52</sup> The register certified the record over and at a hearing before the orphans' court proponents presented a prima facie case by proving the execution of the alleged will by the subscribing witnesses, testamentary capacity being presumed until disproved in accordance with *Grubb v. McDonald*.<sup>53</sup> The caveators then presented a record showing that the testator had, on May 2, 1887, been found "a lunatic and has been so for the space of six years last past and does not enjoy lucid intervals." The will was dated June 28, 1892. The testimony showed the testator was over eighty years of age at the time of signing the will; that his sister, several of his brothers and an aunt were insane, and that he had been adjudged such; that his habits were filthy and he was incapable of taking proper care of his person; that he did not know who were his relatives or next of kin; that he had no clear conception of his property or its value and was under the delusion that his farm contained a large deposit of coal of great value; he was easily influenced, especially by anyone who favored the restoration of his property to his control and that he believed his committee, who was not his next of kin and against whom he at times exhibited feelings of hostility, would secure a portion of his estate unless he made a will. The Supreme Court in a per curiam affirmed the lower court in refusing to grant an issue, dismissing the appeal with the terse comment: "We are convinced that this appeal is destitute of merit." In *Brennan's Estate*,<sup>54</sup> likewise, the lower court refused to grant an issue, this time on appeal from the register admitting to probate the will of an aged maiden woman, who gave the residue of her estate to the husband of her niece. A nephew being dissatisfied with the aunt's will challenged its validity on the grounds that it had been procured by undue influence and testatrix lacked testamentary capacity. The decree of the lower court was affirmed, Kephart, J., pointing out that although testatrix had two years before the execution of the will been adjudged insane, nevertheless, insanity, with or without adjudication, does not invalidate a will made during a lucid interval, irrespective of when made. In this case the proponents had the burden of showing capacity at the time of making and executing the will and did so (1) by evidence that testatrix had such capacity for a reasonable time before and after the time of execution and (2) by evidence of capacity at the time of making the will. The court explained even though the disposition of the property may have been the result of the likes and dislikes of the testatrix, nevertheless, as Paxson, J., declared in *Caffman v. Long*,<sup>55</sup> "A man's prejudices are a part of his liberty,"

<sup>51</sup>174 Pa. 373 (1896) 34 A. 603.

<sup>52</sup>Act of March 15, 1832, P.L. 1831-32, 135; cf. Art. 5, Sec. 22, Pa. Const., adopted in 1873 and Sec. 17, Register of Wills Act, June 7, 1917, P.L. 415, 20 PS 1841 et seq.

<sup>53</sup>See note 45, supra.

<sup>54</sup>312 Pa. 335 (1933) 168 A. 25.

<sup>55</sup>82 Pa. 72 (1876).

and concerning the evidence of condition before and after the execution of the will, this was proper for a reasonable period both ways as indicative of the condition on the particular day, citing *Aggar v. Munnell*<sup>56</sup> and *Rubins v. Hamnett*.<sup>57</sup> The court discussed the evidence for and against the will and weighing the same most carefully came to the conclusion that the judge was correct in the result reached.

In *Brennan's Estate*<sup>58</sup> the appeal was from a decree refusing an issue, which was affirmed, thus sustaining the will and in *Duncan's Will*<sup>59</sup> the appeal was from a decree granting an issue wherein the jury found for the proponents, which was affirmed thus likewise sustaining the will. The testator executed a holographic will on August 19, 1938 while an inmate of the Harrisburg State Hospital for the Insane. In 1908 he had been judicially declared a lunatic with lucid intervals and the following year was committed to this institution where he remained until April 29, 1939, when he was paroled. He went to the home of his sister where he died less than a month later, May 21, 1939. The bulk of the estate amounting to about \$13,500.00 was left to the children of testator's former farmer. These persons had not seen testator after 1909 but he carried on some correspondence with them while in the hospital. The sole surviving sister in whose home he died was not mentioned in the will. A caveat was filed by a nephew and the register certified the record to the orphans' court,<sup>60</sup> and after hearing an issue was awarded to try the question of testamentary capacity. Motions for judgment n.o.v. and a new trial were overruled and an appeal was taken to the Superior Court. Baldridge, J., in affirming the judgment of the court below reviewed the leading cases on testamentary capacity, the burden of proof in adjudicated insanity and the nature of the evidence to rebut the presumption of insanity. It does not follow necessarily that one confined as insane is incapable of making a will. In *Draper's Estate*<sup>61</sup> and in *Sterrett's Estate*<sup>62</sup> it was observed that the will might have been made during a lucid interval, even when the insanity entirely clouds the mind for the time and the testator is confined in an asylum, citing *Titlow v. Titlow*.<sup>63</sup> Furthermore, it was declared to be the policy of the courts to uphold the right of testamentary disposition and protect the testator and "The legal objects of his bounty," citing *Central Trust Co., Ex'r. v. Boyer*.<sup>64</sup> Although the testator had dementia praecox or schizophrenia of a paranoid type, his attending hospital doctor testified that he had an intelligence quotient of 106, which was above normal; that he had a good memory, ability for ordinary business matters, under-

<sup>56</sup>302 Pa. 78 (1930) 152 A. 840.

<sup>57</sup>294 Pa. 295 (1928) 144 A. 72.

<sup>58</sup>See note 54, *supra*.

<sup>59</sup>147 Pa. Super. Ct. 133 (1941) 23 A. 2d. 357.

<sup>60</sup>Sec. 19, Reg. of Wills Act June 7, 1917, P.L. 415, 20 PS 1982. For explanation of procedure as compared with former Registers Ct., see *Cross's Est.*, 278 Pa. 170 (1923) 122 A. 267.

<sup>61</sup>215 Pa. 314 (1906) 64 A. 520.

<sup>62</sup>300 Pa. 116 (1930) 150 A. 159.

<sup>63</sup>See note 49, *supra*.

<sup>64</sup>308 Pa. 402 (1932) 162 A. 806.



standing of the value of money, had capacity of knowing the extent of his estate, who his relatives were, and who the objects of his bounty should be; that he understood thoroughly what he was doing when he wrote a will and knew the effect of such. It was the witness' opinion that while his judgment was poor in some instances, the testator had intellectual capacity to make a will. Against this testimony, contestants presented that of a doctor, who testified as an expert—but who never knew the testator. In his judgment the testator had delusions and while possessed of knowledge, his intelligence was affected by a diseased mind, that "he knew what he was doing" but his "intelligence was missing" and therefore he did not have testamentary capacity. A substantial dispute having been raised it was for the jury to determine whether or not the testator had testamentary capacity as pointed out in *Geist's Estate*.<sup>65</sup> Another interesting conclusion was the court's opinion there was nothing in this case to warrant the application of the stringent rule of *Hardin v. Hays*<sup>66</sup> that the evidence of proponents must be a "most exceptional kind and character." It would appear, however, that the hospital doctor's testimony did measure up to this requirement and in accordance with the circumstances of the case as laid down in *Hoopes' Estate*.<sup>67</sup>

In *Mohler's Estate*<sup>68</sup> there was an appeal from the decree of the Court below refusing to grant an issue and dismissing the appeal from probate. Testatrix left no children and appellant was a nephew who had been named as beneficiary under a former will. The residuary legatee in the challenged will was the officer of a trust company where the decedent had transacted business after the company had been made guardian for her as a weak-minded person. She was under care at a hospital for mental illness from January 7, 1939 to March 27, 1939. On the latter date she was discharged but reported "for check-ups and advice" to the hospital doctor, the last visit to his office being October 31, 1939. The will was dated August 7, 1939 and testatrix died November 28, 1939. The petition for citation alleged lack of testamentary capacity and undue influence practiced by the chief beneficiary. The facts were that testatrix wrote the will herself at the trust company's office on the day of its execution and in the absence of the chief beneficiary from the office and city. There was no evidence whatsoever of undue influence. On the issue of testamentary capacity, the subscribing witnesses were well acquainted with the testatrix and declared that she was at the time competent mentally and that she "knew exactly what she wanted him (the witness) to do," when she requested the will to be subscribed and that she had a knowledge of her property. Maxey, J., rejected the point that it was contrary to public policy for a fiduciary and confidential advisor to be chief beneficiary of the confider's estate, explaining that the law wisely casts upon such a legatee the burden of proving that he used no undue influence to secure the legacy and this rule

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<sup>65</sup>325 Pa. 401 (1937) 191 A. 29.

<sup>66</sup>See note 48, *supra*.

<sup>67</sup>See note 51, *supra*.

<sup>68</sup>343 Pa. 229 (1941) 22 A. 2d. 680.

satisfies all the applicable requirements of "public policy." The hospital doctor testified for contestants but based his opinion of testatrix's lack of testamentary capacity on the fact that she harbored unjust prejudices against others. In dismissing this testimony as entitled to no weight the learned justice observed:

"The persuasive power of a conclusion is proportionate to the cogency of the reasoning by which it is supported. An individual's 'unjust prejudices' against others has no relation to his testamentary capacity and an opinion based 'principally' upon the converse assumption is entitled to little weight."

Attention was likewise called to the pronounced attitude of the courts in protecting the right of testamentary dispositions as declared so forcibly in *Wetzel v. Edwards*<sup>69</sup> and *Kustus v. Hager*.<sup>70</sup>

#### DERANGEMENT

In *Taylor v. Trich*,<sup>71</sup> writing a number of years ago, Williams, J., observed:

"There is no subject that has given rise to more extended discussion in legal and medical circles than insanity. The tests by which its existence and extent are to be determined; the stage of development at which moral accountability ceases; the circumstances under which civil accountability ought also to cease, and contracts to lose their legal value because of the want of mental capacity on the part of him who enters into them to form an intelligent judgment or give an intelligent assent, have been and still are the subjects of earnest debate. The whole subject is, however, better understood than formerly, notwithstanding the want of entire harmony in the conclusions that have been reached."

These observations, in a noted will case involving the intricate question whether a testator was laboring under delusions, are just as apt today, although there have been great advances in the manner of what is now called mental illness. According to a noted psychiatrist, writing for popular reading,<sup>72</sup> mental distortions are, *inter alia*, perceptual, consisting of illusions, hallucinations and disorientation. Or they may be intellectual, consisting of obsessions, memory distortions, dissociations and delusions.

In *Taylor v. Trich*, *supra*, Williams, J., citing *Tawney vs. Long*<sup>73</sup> for the principle that partial insanity is enough to defeat a will, which is the result of such mental condition, further explained:

"By partial insanity is meant, not some intermediate stage in the development of mental derangement, but disturbances at some particular point not involving the mind at any other point. A person thus affected is said to be under the influence of a delusion."

<sup>69</sup>340 Pa. 121 (1941) 16 A. 2d. 441.

<sup>70</sup>269 Pa. 103 (1920) 112 A. 45.

<sup>71</sup>See note 38, *supra*.

<sup>72</sup>The Human Mind by Karl A. Menninger (1930).

<sup>73</sup>76 Pa. 106 (1874).

A delusion rather loosely defined is a false impression or belief usually of a fixed nature.

In the leading English case of *Dew v. Clark*,<sup>74</sup> Sir John Nicoll declared:

"Whenever the patient once conceives something extravagant to exist which still has no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, such patient is said to be under a delusion in a peculiar, half technical sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test of absent or present insanity. In short, I look upon delusion in this sense of it, and insanity, to be almost, if not altogether, convertible terms; so that a patient, under a delusion, so understood, on any subject or subjects in any degree, is for that reason essentially mad or insane on such subject or subjects in that degree."

Rood in his work on Wills<sup>75</sup> makes the statement that deranged action of the mind is discovered "by observing the likes and dislikes, conduct, and beliefs of the person" and further deduces that "the greater the degree of extravagance observed in the likes and dislikes, conduct, and beliefs of the person, the stronger is their tendency to produce a conviction that the person is not in his right mind; till finally an extreme may be reached, as to any one of these or as to all three combined, which we cannot account for on any other hypothesis than that the person was not in possession of his senses."

In our cases the word delusion is used to express the mental states which psychiatrists classify as delusions, hallucinations and illusions, the latter being perceptual, the second being intellectual, and the first partaking of both. In *Tawney v. Long*<sup>76</sup> testator evidently suffering from senile dementia was under the delusion that his wife at the time eighty years of age was immoral and guilty of meretricious relationship with their son-in-law, a false and fantastic belief, which the lower court pronounced as "monstrous." In *Hoopes' Estate*,<sup>77</sup> a case of general insanity, the testator was afflicted with several delusions, inter alia, that his farm was underlaid with rich coal deposits—an instance of delusion of grandeur—another that his guardian would get his estate unless he made a will—a sort of persecutorial delusion. In *Taylor v. Trich*<sup>78</sup> the delusion was religious and apparently of what has been called "the Jehovah complex." Another noted case is *Thomas v. Carter*<sup>79</sup> where testator entertained against his own flesh and blood a monomaniacal delusion, conceiving his daughter to be immoral and always a bad character and his son-in-law as a knave. In affirming the judgment

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<sup>74</sup>3 Addams Ecc. 79, 90.

<sup>75</sup>Rood on Wills, 2nd. Ed. (1926) 84.

<sup>76</sup>See note 73, supra.

<sup>77</sup>See note 51, supra.

<sup>78</sup>See note 38, supra.

<sup>79</sup>170 Pa. 272 (1895) 33 A. 81.

of the lower court setting aside the will which disinherited the daughter, the following instruction to the jury was approved:

"If a monomaniacal delusion is unalterably entertained against a wife or daughter, who otherwise would have been his legatee or devisee, and who would seem to be the natural object of a man's regard when he came to make a final disposition of his estate, and such delusion is shown to have been the operating motive which excluded them; and if the supposed act or misconduct, on the part of the wife or child, or both, had no existence in fact, and was a creature of the diseased imagination of the testator, and the will was engendered by this delusion and was its offspring, and made under its influence operating at the time and in the testamentary act; if, in short, the will was dictated by the delusion it cannot be sustained as a last will and testament, because it is the production of a mind incapable of correct reasoning as to the object of his bounty and the character of his wife and children, and their relations toward himself."

As a guide in the matter of proper instruction to a jury in such a case, the above quotation should prove valuable to those handling cases of a similar nature, as it appears that the learned judge has covered very accurately the various essential points. In the four preceding cases<sup>80</sup> just discussed, it will be observed that testamentary power was denied either on the ground of general insanity, that is where delusions were so varied as to becloud the mind of the testator completely, or that the testator was at the time afflicted with such a delusion as directly affected and was connected with his exercises of testamentary disposition. It should be reasonably obvious however that whatever serious delusion happened to beset the mind of a testator, if such delusion had no connection with the matter of testamentary disposition, however serious it might otherwise be, nevertheless the testamentary power would remain in force. A few cases will illustrate this point. In *Herr's Estate*<sup>81</sup> the question was whether the lower court erred in refusing an issue and dismissing the appeal from the decree of the register. The testatrix was 83 years of age at the time of her death, leaving a will made nine years prior, in which, after giving specific legacies to certain missionary and church extension societies connected with the United Brethren in Christ, testatrix gave her residuary estate amounting to about \$130,000.00 to the Union Biblical Seminary of the United Brethren in Christ, Dayton, Ohio. The will was contested by a half-sister who was the nearest relative of the decedent. In the opinion by Frazer, J., the evidence of testamentary capacity is reviewed at considerable length involving the testimony of disinterested and substantial witnesses who were present at the time of the execution of the will which took place in the office of counsel for the testatrix. On the other hand, the evidence of lack of testamentary capacity consisted of testimony concerning "spells" to which the testatrix was subject and also the fact that she was miserly

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<sup>80</sup>Tawney v. Long; Hooper's Estate; Taylor v. Trich; Thomas v. Carter.

<sup>81</sup>251 Pa. 223 (1915) 96 A. 464.

and did not provide for herself sufficient food. It was further contended that the will was induced by hallucinations or delusions under which testatrix had been laboring for years, to the effect that her friends and relatives, with particular reference to the contestant, were endeavoring to rob her of her property. However, evidence was also adduced to show that there was some justification for the fears entertained by the testatrix on account of litigation that had been conducted by the contestant. On these points the learned justice in affirming the decree of the court below observed:

"A delusion which will render invalid a will executed as the direct result of it, is an insane belief or a mere figment of imagination, a belief in the existence of something which does not exist, and which no rational person would believe did exist: *Taylor v. Trich*, 165 Pa. 586; *Alexander's Est.*, 246 Pa. 58. The moment it is discovered, however, that what at first sight was apparently a delusion is in fact based upon some substantial ground, reasonably calculated to produce the belief held by testatrix, the theory of the insane delusion necessarily disappears. One who is of sound and disposing mind is entitled to distribute his property as he may see fit, without regard to the personal motives or prejudices which influenced him: *Dean v. Negley*, 41 Pa. 312; *Phillips' Est.*, 244 Pa. 35. His prejudices, likes or dislikes are his own as much as the property which he distributes, and the fact that his method of distribution may offend our sense of propriety and justice is no reason to set aside the will: *Cauffman v. Long*, 82 Pa. 72; *Phillips' Est.*, 244 Pa. 35-47."

Doster's Estate<sup>82</sup> presents another illustrative case, somewhat dramatic in background and details. There was an appeal from the register of wills, the contestant claiming that decedent at the time he made his will was under the insane delusion that she was not his daughter. The court dismissed the appeal and refused an issue. Whereupon the contestant appealed to the Supreme Court. The testator, General William E. Doster, was a man of high intellectual attainment, a prominent lawyer for more than fifty years and a veteran of the Civil War, serving his country with distinction. He died at the age of 82, and up to his last day had a large, varied and lucrative practice which required his constant care and personal supervision. He is described as a man of strong mind and remarkable physical vigor, personally supervising the management of his ten farms, a banking institution, and looking after a large law practice. He was known to have an arbitrary manner, a short curt military way of speaking and given at times to anger and bitter recollections.

The contestant had been educated by the father who sent her to Europe at the age of 12 years, and he had seen very little of her and had left her education in the charge of strangers. The immediate facts involving the alleged delusion consisted of a most unfortunate visit of the daughter and her family to the father

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<sup>82</sup>271 Pa. 68 (1921) 113 A. 831.

on July 17, 1918, uninvited, unannounced, as he was entertaining a guest in his home. The conduct of the daughter was such as to outrage the father and on July 25, 1918, at the age of 80 years, he wrote his will which became the present subject of contest. After the incident of July 17, 1918, General Doster referred to the contestant as not being his daughter. The lower court construed this allusion not in the literal sense as contestant did, but in rather a broad way as explaining the father's attitude toward the daughter following the unfortunate incident already described. All the evidence indicated that General Doster at the time he wrote his will was in possession of all his faculties and although he may have been unjust and unforgiving in his attitude toward his daughter, after July 17, 1918, nevertheless, as remarked by Kephart, J., in affirming the decree of the lower court:

"If his treatment of his daughter is to be considered cruel the person who must answer for it is the General. For, out of his large circle of acquaintances in that community, not one of his business or professional associates was called to testify to want of testamentary capacity."

In *Guaranty Trust & Safe Deposit Co., Guardian, vs. Heidenreich*<sup>83</sup> there is a further illustration of the attitude of our courts in denying the efficiency of any delusions entertained by the testator but which are obviously foreign to the matter of the will making. In this case the action of the lower court was set aside in the granting of an issue and the judgment on the verdict was reversed and the record remitted in order that the will might be duly probated. The testator was a farmer 83 years of age at the time he executed his will under the supervision of an attorney of good standing and after several conferences and considerable discussion. The signature appeared in a clear strong hand and was witnessed by two neighbors of the testator. There were other witnesses consisting of lawyers, bankers, merchants, mechanics, collectors and others who had done business with the testator and who gave evidence concerning his testamentary capacity at the time. The son filed a caveat and the proceedings were certified by the register to the orphans' court where later testimony was taken and an issue awarded resulting in a verdict and judgment for the contestant. The evidence for the contestants was to the effect that the testator was "crazy," that he was afflicted with senile dementia, a progressive malady, and, while he might do some business, was incapable of making a valid will, that he suffered from delusions concerning religion and marriage. The appellate court inferred that the testimony might tend to show that testator was a victim of erotomania, but that there was no evidence connecting the delusions with the testamentary dispositions. It is also pointed out that several months before the execution of the will in question the testator had executed another will drawn by the lawyer who later represented

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<sup>83</sup>290 Pa. 249 (1927) 138 A. 764.

<sup>84</sup>206 Pa. 47 (1903) 55 A. 797.

the contestant in the present proceedings, this former will having been attested by the particular attorney and his wife, and that at the trial in the case now under consideration neither of these parties was asked concerning the testator's mental condition.

As to the irrelevancy of the evidence on delusions, Walling, J., declared:

"Considering and reconciling the evidence as best we may, it clearly appears that testator's mind was sound as to matters of business, while a finding that he had delusions as to religion and matrimony would be warranted. Delusions, however, will not affect the validity of a will unless it is influenced thereby. 'A person whose mind is perverted by insane delusions with references to one or many subjects, however unreasonable and absurd, may nevertheless make a valid will provided the provisions of such will are not influenced by such delusions': *Shreiner et al. vs. Shreiner*, 178 Pa. 67; see also *Doster's Est.*, 271 Pa. 68; *Englert v. Englert*, 198 Pa. 326; *Thomas, Exr. vs. Carter, et al.*, 170 Pa. 272; *Taylor, Exr. vs. Trich, et al.*, 165 Pa. 586; and *Watmough's Est.*, 258 Pa. 22, 28. There is no evidence that testator was under any delusion as to his property, or kindred. Neither the clergymen, the church, nor the one he desired to marry, is mentioned in the will; his entire estate being given to his children and grandchildren, all of whom were named therein. Hence, as the delusions were entirely aside therefrom they are unimportant."

In *Alexander's Estate*<sup>84</sup> a daughter appealed from the decree of the Register admitting the will of her father to probate and in a petition to the orphans' court praying for an issue averred that the will, so far as it affected her, was the result of a delusion upon the part of the testator which rendered him insensible to his parental obligations and to have caused him to execute the will admitted to probate. The court refused to award the issue and on appeal its decree was affirmed. The father's attitude towards his daughter was explained by her "unnatural conduct" in criticising the father's mode of life and also casting aspersions upon the memory of her dead mother. The evidence disclosed that there were many stories of her criticisms which were carried to the father and that they had caused him much distress of mind. In affirming the decree the following from the lower court's opinion was approved, showing sufficient justification for the father's will:

"Whether Mr. Alexander is to be condemned for listening to rumors and idle gossip or, perhaps, to false stories told by persons to discredit his own child, is not a question that this court is called upon to decide. The only inquiry is whether there is evidence from which a jury might reasonably infer that Mr. Alexander was laboring under a mental disorder; and the result of that inquiry is that there is nothing to show that he did more than take the stories as they came to him, including the story about his dead wife, believe them and pass a very severe judgment upon the daughter."

In *Watmough's Estate*<sup>85</sup> there was an appeal from the decree of the register admitting a will to probate and a dismissal of the appeal by the orphans' court, which refused to award an issue prayed for alleging testamentary incapacity, where the only evidence relied upon to establish the issue was that of a physician who had attended the testator for a period of eight years prior to his death and who testified that he observed no mental decline until on an occasion two and one-half months before the execution of the will, when the deceased was in his 77th year, he declared to the doctor that he was annoyed by red devils with forked tails who had danced upon him during the night. The witness further stated that there were days in the month preceding the execution of the will when the deceased was entirely free from delusions and clear in mind and when he knew his relatives and had an intelligent understanding of the value of his estate. For the proponents of the will two reputable attorneys, witnesses to the execution of the will, testified that the testator was at the time of the execution in full possession of his faculties and had himself dictated the will and was fully informed with respect to all that it contained.

In a recent case<sup>86</sup> the Supreme Court has pointed out the circumstances under which an unfounded belief degenerated into an insane delusion affecting fatally the will of an aged uncle who disinherited a nephew. For nearly forty years the relationship between the two had been as father and son when immediately following the funeral of testator's wife, for no sensible reason, his feeling toward his nephew suddenly underwent a violent change. This change appeared to have been based on the false belief of the uncle that his nephew planned sending him to an institution. Said Drew, J.:

"We agree with the jury and the court below that the uncle's sudden and bitter accusation of his nephew (whom he had for so many years cherished with love and affection), charging that he plotted to have him confined in an institution in order to obtain control of his estate, could be the result of only an insane delusion."<sup>87</sup>

#### ANTIPATHIES

Under any topic in the matter of testamentary dispositions are grouped a number of human emotions and mental states which have a powerful directive influence upon the individual guiding or driving him in the determination of the disposition of his property. Keeping in mind the theory of testamentary power as an exaltation of the individual's freedom of action—that he may do with his own as he pleases, barring the restrictions already discussed, the advance is made to the presumption of testamentary capacity—that every will maker is presumed to have a consciousness and full realization of the import of the testa-

<sup>85</sup>258 Pa. 22 (1917) 101 A. 857.

<sup>86</sup>*Leedom's Estate*, 347 Pa. 180 (1943) 32 A. 2d. 3.

<sup>87</sup>Compare *Leedom Case with McGovran's Estate*, 185 Pa. 203 (1897) 39 A. 816, and *Herr's Estate* (note 81 ante).



mentary act and the burden is upon him who controverts this status, the conclusion is inevitable that the motive for action is irrelevant. Sympathy or antipathy, likes or dislikes, love or hatred, as the motive directing the gift are each and all wholly immaterial in the view of the law. Long ago, Paxson, J., in *Cauffman v. Long*,<sup>88</sup> quoted with approval the glib dictum of another, "A man's prejudices are a part of his liberty," a saying since quoted many times over. As recent as *Mohler's Estate*<sup>89</sup> Maxey, J., observed:

"As to Mrs. Mohler's prejudices the court below appropriately said: 'She was indignant over the appointment of the guardian. . . . However, she was entitled to her likes and dislikes, her preferences and prejudices, and even when overdrawn or in error this attitude does not justify the conclusion she was unable intelligently and capably to make her will!'"

In *Mark's Estate*<sup>90</sup> likewise it was declared that antipathies against relatives, standing alone are no evidence of a disordered mind nor do they imply an impaired mentality. In *McGovran's Estate*<sup>91</sup> the evidence showed marked hostility upon the part of the testatrix towards a niece attributing every attention received from that source to mercenary motives and believing not only that she was scheming to get a portion of testatrix's estate but expressing fear the niece might take her life the sooner to enjoy it. This case probably marks the verge of the law, the court pointing out that if the evidence of such a condition of mind and feeling upon the part of testatrix had been followed by other evidence showing the same as based upon the supposed existence of facts which never existed and which no rational person, in the absence of evidence, would have believed to exist, this situation would be consistent with a theory of delusion. In *Thomas v. Carter*<sup>92</sup> an illustration is presented of antipathies and unfounded beliefs and prejudices transcending from the innocuous to monomaniacal delusions affecting fatally testamentary capacity. Thus in *Matter of Mintzer*<sup>93</sup> it was declared:

"If a testator entertains against his own flesh and blood some monomaniacal delusion, and because of the existence of this delusion, and while laboring under its affects, he disinherits them, the act is evidently one for which he would not be morally or legally responsible, it is the act of a man laboring under a specific species of insanity, and the testator is not and cannot be deemed to be a rational being—he is not a free agent."

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<sup>88</sup>See note 55, *supra*.

<sup>89</sup>See note 68, *supra*.

<sup>90</sup>298 Pa. 285 (1929) 148 A. 297.

<sup>91</sup>185 Pa. 203 (1898) 39 A. 816.

<sup>92</sup>See note 79, *supra*.

<sup>93</sup>5 Phila. 206 (1863).

## BELIEFS AND OPINIONS

Every individual is entitled to hold his own particular and peculiar beliefs and opinions and the rule of law is that such beliefs and opinions, sound or erroneous, do not necessarily<sup>94</sup> militate against testamentary capacity. Judge King in *Leech v. Leech*<sup>95</sup> referring to witchcraft and other strange beliefs, observed:

"Eccentricities of conduct, absurd opinions, or belief, in things appearing to us extravagant, although they may be and are evidences of testamentary incapacity, do not constitute it necessarily and in themselves."

If, however, such beliefs or opinions, religious or otherwise, unsound or extravagant, become delusions, affecting directly the testamentary disposition, the question of incapacity of the testator is presented.<sup>96</sup> Conversely, it has been held that a mere belief in spiritualism is not, of itself, evidence of insanity and sufficient to show the absence of testamentary capacity. But if a person has become a monomaniac on the subject, incapable of reason where it is concerned, then a will made in consequence of such monomania is void for lack of testamentary capacity.<sup>97</sup>

## SUMMARY

From a study of the foregoing cases the following propositions of law are established:

(1) Every person of sound mind and of the age of twenty-one years or upwards, whether married or single, is competent to make a will disposing of his or her property.<sup>98</sup>

(2) In the cases of nuncupation generally the required age of the testator is twenty-one years or upwards, but it has been held that this age requirement does not apply to "any mariner being at sea or any soldier in actual military service," in which cases the age required is over fourteen years in accordance with common law.<sup>99</sup>

(3) The test of sound disposing mind is formulated in many cases notably in *Leech v. Leech*<sup>100</sup> by Judge King and followed consistently by later decisions.

<sup>94</sup>Lawrence's Est., 286 Pa. 58 (1926) 132 A. 786, per Kephart, J. Also, *Eccentricities and Testamentary Capacity* by James.

<sup>95</sup>1 Phila. 244 affirmed in 21 Pa. 67 (1853). Zaydon, 46 D. L. R. 254.

<sup>96</sup>But delusions will not destroy testamentary capacity unless they dictate the will: *Power v. Overholt*, 257 Pa. 254 (1917) 101 A. 733; *Shreiner v. Shreiner*, 178 Pa. 57 (1896) 35 A. 974; *Guarantee T. & S. Dept. Co. v. Heidenrich*, 290 Pa. 249 (1927) 138 A. 764; 68 C. J. 432, sec. 29.

<sup>97</sup>*Matter of Mintzer*, 5 Phila. 206 (1863); *Ann. Cas.* 1916 C. 4.

<sup>98</sup>20 PS 181.

<sup>99</sup>30 D.R. 413 (1921); see also *Satar's Est.*, 275 Pa. 420 (1923) 119 A. 478; *Smith's Will*, 6 Phila. 104 (1865); *Linsenbiger's vs. Gourley*, 56 Pa. 166 (1867); *McNelis' Est.*, 22 D.&C. 486 (1935); *Gromczuski's Est.*, 19 Erie 478, 51 York 186 (1938).

<sup>100</sup>See note 6, supra.

(4) The courts have recognized in a long line of decisions "the unquestioned right which every one master of himself has to give his property to whom he pleases," per Maxey, J., citing *Kustus v. Hager*<sup>101</sup> as quoted in *Mohler's Estate*.<sup>102</sup>

(5) No right of a citizen is more valued than the power to dispose of his property by will and his last and final direction should not be struck down except for the clearest reason.<sup>103</sup>

(6) Where a paper in testamentary form is proved to be properly executed there arise two presumptions (a) that the will maker was of testamentary capacity and that the testamentary act was free from undue influence.<sup>104</sup> And (b) that the will maker was at the time of the execution of the will "of the age of twenty-one years or upwards."<sup>105</sup>

(7) To upset such a will the contestants must adduce compelling evidence, since the law favors its validity, per Drew, J.<sup>106</sup>

(8) If the will is probated and no appeal is taken for two years, from the decree of the Register, the presumption as to full age becomes conclusive.<sup>107</sup>

(9) An adjudication of the insanity of the will maker either shortly before the execution of the will or shortly afterward, or any other evidence of insanity at or about the time of execution of the will, offered by contestants will dislodge the presumption of capacity and impose upon the proponents the burden of establishing the same by a preponderance of evidence.<sup>108</sup>

(10) A will maker shown by the weight of evidence to have been generally insane at the time of execution lacks testamentary capacity and the will is invalid.<sup>109</sup>

(11) A will maker shown by the weight of evidence to be partially insane may nevertheless have testamentary capacity if the weight of evidence shows a lucid interval at the time of execution sufficient to measure up to the prescribed test.<sup>110</sup>

(12) Old age, sickness, distress, debility of body, peculiar beliefs and opinions, incapacity to do business, partial failure of memory neither prove nor raise a presumption of incapacity.<sup>111</sup>

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<sup>101</sup>269 Pa. 103 (1920) 112 A. 45.

<sup>102</sup>See note 89, *supra*.

<sup>103</sup>*Wetzel v. Edwards*, 341 Pa. 121 (1940) 16 A. 2d. 441.

<sup>104</sup>*Olshefski's Est.*, 347 Pa. 420 (1940) 11 A. 2d. 487.

<sup>105</sup>*Stout v. Young*, 217 Pa. 427 (1907) 66 A. 659.

<sup>106</sup>See note 104, *supra*.

<sup>107</sup>See note 105, *supra*.

<sup>108</sup>See notes 48-53, *supra*.

<sup>109</sup>See notes 40 and 51, *supra*.

<sup>110</sup>See note 59, *supra*.

<sup>111</sup>Per Kephart, J., *Lawrence's Est.*, *supra*. See note 19, *supra*.

(13) A delusion amounting to monomania and shown to be the immediate cause of the testamentary disposition may render the will invalid although the testator has general testamentary capacity.<sup>112</sup>

(14) Antipathies, dislikes and hatreds reflected in testamentary dispositions are of themselves insufficient to render a will invalid unless they transcend to delusions as heretofore stated.<sup>113</sup>

(15) A potent and frequently controlling factor in will contests is the exercise of the judicial function as developed in the evolution of the issue *devisavit vel non*. This interesting feature of the law of wills will be discussed in a later article, but a reading of the cases already cited will be helpful at this point.<sup>114</sup>

A. J. WHITE HUTTON

February 22, 1945.

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<sup>112</sup>See note 92, *supra*.

<sup>113</sup>See note 91, *supra*.

<sup>114</sup>See note 14, *supra*.